Office Supreme Court, U.S.
FILED
MAR 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 839

ORVILLE P. FOX AND ST. CHARLES NATIONAL BANK, AS TRUSTEE UNDER TRUST NO. 85,

Petitioners,

vs.

NORTHERN ILLINOIS DEVELOPMENT CORPORATION, OPERATING THE AURORA DOWNS, INC. (A WHOLLY OWNED SUBSIDIARY),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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STATEMENT OF FACTS.

This involves an Agreement of Sale, relating to the Aurora Downs Race Track at Aurora, Illinois. The Sellers are Orville P. Fox and the St. Charles Bank. The Purchaser was David Schwanz, whose place has been taken, by assignment, by Northern Illinois Development Corporation (NIDC). The Agreement was entered into in 1957. The Purchase Price was $1,300,000. In 1957-1958, NIDC paid Fox $514,000. NIDC also spent over $900,000 improving the Race Track. In 1959-1960 difficulties developed between

Fox and NIDC, resulting in litigation in the Circuit Court of Kane County, Illinois, with regard to the Agreement. While that litigation was pending, and before it was resolved, Fox induced three small Creditors of NIDC to file a Petition for Involuntary Bankruptcy in the present case.

Fox then filed a Petition before the Bankruptcy Referee, asking for a determination that NIDC had defaulted and that the Agreement had been forfeited. NIDC filed a Counter-Petition, asking for a determination that there had not been a valid forfeiture. NIDC also filed a Petition for an Arrangement with Creditors under Chapter XI of the Federal Bankruptcy Act, stating that if the Agreement was upheld, NIDC proposed to sell the Race Track for $1,500,000, following which it would pay Secured Creditors, including Fox, in full and would pay Unsecured Creditors 75¢ on the $1.00. NIDC later entered into an Agreement to sell the Race Track to Hilton Inns, Inc., and Racing Enterprises, Inc., for $1,500,000. Hilton first deposited $50,000 and later deposited over $1,000,000.

The Bankruptcy Referee held that there had not been a valid forfeiture and that the Agreement was still in force. The Plan of Arrangement is still pending, not yet having been confirmed. NIDC has not been adjudicated a Bankrupt.

Fox appealed to the District Court, which affirmed the Referee's Order relating to the Agreement. Fox and the Bank then filed an Appeal, Docket No. 13742, in the Court of Appeals for the Seventh Circuit.

In the meantime, the Agreement with Hilton and Racing Enterprises came to an end by its own terms and was not renewed, and Hilton withdrew its deposit of over $1,050,000.

On June 15, 1962, NIDC entered into an Agreement with Titus Haffa to sell the Race Track for $1,500,000. The

Referee approved this Agreement and the District Court affirmed. Fox and the Bank filed a separate Appeal, Docket No. 13814, in the Court of Appeals. The two Appeals were consolidated and were argued on October 30, 1962.

The United States Court of Appeals for the Seventh Circuit handed down its Opinion on November 20, 1962, affirming the Orders of the District Court as to the original Agreement of Sale and as to the proposal to sell to Haffa. The Opinion is reported at 309 Fed. 2d 882 (1962). The Court of Appeals affirmed the Decisions of the Referee and of the District Court, holding that Fox had not forfeited NIDC's interest under the Installment Agreement. The Court observed, "Fox's conduct estops him from effecting a forfeiture and, under the circumstances involved, a forfeiture would result in an unconscionable and unjust enrichment." The Court further held that Fox had no standing to object to the Agreement of Sale to Haffa.

Fox's Petition for Certiorari states that it does not seek review of that part of the Decision of the Court of Appeals, holding that Fox's attempted forfeiture was invalid. *This is of great significance, because the major point of this litigation up to this date, and the principal thrust of all of Fox's efforts, has been to try to uphold his attempted forfeiture. This is the first time Fox has admitted that his attempted forfeiture was invalid.*

The Petition for Certiorari goes on to state that the following questions merit review by this Court:

1. Whether a Debtor lawfully may sell all of its assets at a private sale in proceedings under Chapter XI of the Bankruptcy Act.

2. Whether a stockholder of the Debtor, who is also a secured creditor, is by force of the latter fact deprived of standing to attack the legality of the sale mentioned in question 1.

Respondent contends that, under the facts of this case, these questions are not controlling, and that these questions, in any event do not merit review of this case by this Court.

First, the questions set forth in the Petition for Certiorari are not the controlling questions of the case. *The controlling questions of the case, rather, relate to a Seller's attempt to forfeit a Buyer's Installment Agreement to purchase Real Estate.* This was the principal issue in the Hearings before the Referee in Bankruptcy, and on the Petition for Review before the District Court, and on Appeal to the Court of Appeals for the Seventh Circuit. The briefest review of the case will reveal that the Seller, Orville P. Fox, went to the greatest conceivable lengths in attempting to accomplish a forfeiture. Fox's motivation was clear—he wanted to keep the $514,000 payments already made on the Agreement and to take back the Race Track, together with the improvements of over $900,000. Finally, when Fox found that he was not succeeding in the State Courts, he induced three small Creditors to file a Petition for Involuntary Bankruptcy against the Buyer, Northern Illinois Development Corporation. *The Bankruptcy Proceeding, therefore, is actually an extension of Petitioner Fox's original attempt to forfeit NIDC's interest as a Buyer in the Installment Agreement.* It is clear that Petitioner Fox does not occupy the usual position of a Creditor, raising bona fide objections with reference to a Bankruptcy Proceeding; but rather that, having brought the whole thing about, and standing to benefit the most if he succeeds, Fox is acting solely in his own interest, without any real concern for NIDC, its other Creditors, or its Shareholders.

Even if the questions of Bankruptcy Law set forth in the Petition for Certiorari were controlling in the present case, these questions have been adequately disposed of by the District Court and the Court of Appeals, and do

not merit further review by this Court. This will be discussed briefly under the heading "Petition Does Not State Questions Meriting Further Review" at Pages 5 through 11 of this Respondent's Brief.

PETITION DOES NOT STATE QUESTIONS MERITING FURTHER REVIEW.

The Petition for Certiorari argues that there are two important questions of Bankruptcy Law which merit review by this Court. Respondent contends, as has already been stated at page 4 of Respondent's Brief, that the controlling questions in this case do not relate to the Federal Bankruptcy Act, but, rather, to a Seller's attempt to forfeit a Buyer's Installment Agreement to purchase Real Estate. However, even if questions of Bankruptcy Law were controlling in this case, these questions have been adequately disposed of by the District Court and the Court of Appeals, and do not merit further review by this Court. The questions presented in the Petition for Certiorari are as follows:

1. May a Debtor, pursuant to a Plan of Arrangement under Chapter XI of the Federal Bankruptcy Act, sell all of its assets at a private sale?

The Petitioner argues that NIDC's (the Buyer's) proposed sale of its interest in the Race Track and the proposed Plan of Arrangement with Creditors, are contrary to law. The Petitioner cites one case (*In re Pure Penn Petroleum Co.*, 188 Fed. 2d 851, C. A. 2) for the proposition that a Debtor cannot make such a sale under a Chapter XI Plan of Arrangement with Unsecured Creditors.

Respondent, NIDC, contends that the Decisions of the Referee in Bankruptcy, of the District Court, and of the Court of Appeals, permitting NIDC to enter into an Agreement of Sale of its Buyer's interest in the Race Track, are fully supported in law.

Section 313 of the Federal Bankruptcy Act (United States Code, Title 11, Chapter XI, Section 713) clearly vests power in the Federal Courts to authorize a Debtor to sell its property, on such terms and conditions as the Court may approve. In the present case, the Debtor's major asset is its Buyer's interest in a Race Track, a speculative enterprise, perishable in nature, and requiring immediate action. If the Debtor cannot sell its interest in the Race Track, the Debtor literally has almost no assets to sell and no way of making any distribution to Creditors. The contrary is clearly true, namely, that the Referee and the District Court acted within their powers under the Federal Bankruptcy Act, in permitting the sale.

Moreover, Section 306(1) of the Federal Bankruptcy Act (United States Code, Title 11, Chapter XI, Section 706) defines a Plan of Arrangement as "*any plan* of a debtor for the settlement, satisfaction or extension of the time of payment of his unsecured debts, upon any terms". Finally, Section 357 of the Act (United States Code, Title 11, Chapter XI, Section 757) has broadly permissive language in it with regard to Plans of Arrangement. Section 357(5) provides that an arrangement *may* include "provisions for continuation of the debtor's business"; and Section 357(8) provides that an arrangement may include "any other appropriate provisions not inconsistent with this Chapter."

The point of these provisions of the Federal Bankruptcy Act is that the Federal Courts are given considerable latitude in dealing with a Debtor's Plan of Arrangement. The purpose of Chapter XI is to give a Debtor every opportunity to work out its obligations to Creditors, provided the Plan is accepted by a majority of Creditors and is found by the Court to be fair and equitable. In the present case, the Debtor's Plan has been accepted by an overwhelming majority of the Creditors. It is true that the Plan has not yet been confirmed, but the Court has

approved of the Debtor's Agreement to sell its interest in the Race Track for $1,500,000.

This is supported by the case of *In re Magazine Associates, Inc.*, 46 Fed. Supp. 808 (D. C., S. D. New York, 1941). In that case the Debtor proposed to sell its major asset and then to liquidate, all pursuant to a Plan of Arrangement under Chapter XI. One of the Creditors objected. The Referee overruled the objection. Following a Petition for Review to the District Court, that Court affirmed the Referee's holding. The District Court observed at Page 811:

> "The second question presented relates to the propriety of the liquidation features in the plan of arrangement. Section 356 contains a mandate that an arrangement under Chapter XI 'shall include provisions modifying or altering the rights of unsecured creditors generally or of some class of them, upon any terms or for any consideration.'
>
> "The plan meets this requirement by the proposed acceptance of the offer of Esquire, Inc., to satisfy claims on account of unfilled subscriptions by delivery of its own magazine. The plan, in my opinion, was not vitiated by inclusion therein of provisions for liquidation and distribution, even though it be assumed that an arrangement, the sole purpose of which is liquidation of the debtor's assets, is not within the scope of Chapter XI. Whatever may have been the law under the composition sections of the old statute, I am quite clear that the terms of the present act force such a conclusion today. Section 306(1) defines an 'arrangement' as '*any plan* of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, *upon any terms.*'
>
> "This is extremely broad language. Section 357 enumerates certain permissive—in contradistinction to the mandatory language of Section 356—provisions for arrangements. Thus, under Section 357(5), an arrangement *may* include 'provisions for continuation of the debtor's business with or without supervision

or control by a receiver or by a committee of creditors or otherwise.' "

The *Pure Penn Petroleum* Case, cited by Petitioner, is clearly not controlling in the present case. In that case, the complaining party was an Unsecured Creditor. In the present case, the Petitioner is a Secured Creditor, who will be paid in full. The Petitioner himself, and not NIDC, is the one who started the Bankruptcy Proceeding. Moreover, in the present case, the Unsecured Creditors themselves are overwhelmingly in favor of the proposed Sale and the Plan of Arrangement. Out of 56 Unsecured Creditors, 35 have filed their consents, representing over $204,000 out of a total of $251,000 claims. Moreover, even if the *Pure Penn* Case were controlling in the present case, the facts here are such as to bring this case within that ruling. The *Pure Penn* Case states that a Debtor can sell its principal asset in a Chapter XI Proceeding if the asset is perishable and if there is an emergency. While it may be doubted that Congress intended Chapter XI of the Bankruptcy Act to be limited in this way, it is nevertheless clear that, in the present case, the Debtor's asset is perishable and there is an emergency. The asset, a Buyer's equitable interest in a Race Track is perishable in the extreme. The situation produced by Fox's attempted forfeiture of that Buyer's interest is one of the greatest emergency. The Debtor's sale of its interest in the Race Track is clearly within the law.

2. Does a Stockholder of the Debtor, who is also a Secured Creditor, have standing to attack the legality of a Debtor's proposed Sale of its assets, pursuant to a Plan of Arrangement under Chapter XI of the Federal Bankruptcy Act?

The Petitioner further argues that this Court should review the case because the Court of Appeals improperly

held that he had no standing to attack NIDC's proposed Sale to Haffa.

Respondent, NIDC, contends that the Decisions of the Referee in Bankruptcy, of the District Court and of the Court of Appeals, finding that Petitioner Fox had no standing to object to the proposed Sale, are fully supported in Law.

It should first be pointed out that Petitioner Fox, in now assuming the role of an objecting Stockholder, has shifted his theory of the case. Fox's position before the Referee was that of a Seller and Secured Creditor, seeking to take almost all of the Debtor's assets away from it by way of an attempted forfeiture. Having failed in that effort, Fox now shifts his ground and attempts to achieve the same end by stating that he is a Stockholder who should be permitted to object to the proposed Sale. His purpose is clear. If he can prevent the Debtor from going ahead with its Plan of Arrangement under Chapter XI, the Debtor will be thrown into full Bankruptcy; and, if that can be delayed long enough, Fox would still perhaps stand a chance of claiming that the Buyer's time had run out and that he should get back the entire Race Track, as well as being permitted to retain the $514,000 already paid, plus the improvements of over $900,000 to the Track. The Court of Appeals properly held that this was not to be countenanced.

It is clear that Petitioner Fox, in his role as a Secured Creditor, has no standing to object to the Plan of Arrangement and the proposed Sale. Petitioner is a Secured Creditor who will be paid in full. The Federal Bankruptcy Act clearly provides that a Plan of Arrangement under Chapter XI shall be voted upon by "a majority in number of all creditors * * * *affected* by the arrangements * * *." (Section 362) (United States Code, Title 11, Chapter XI, Section 762). It has uniformly been held that the only

Creditors "affected by a Chapter XI Plan" are the Unsecured Creditors. In Remington on Bankruptcy (1955), it is stated at Section 3643:

> "Chapter XI of the Bankruptcy Act deals only with the settlement and composition of the rights of unsecured creditors of the debtor. It is obvious, therefore, that the rights of secured creditors are in no way affected by confirmation of the proposed arrangement."

The cases establish the proposition, for instance, that a Mortgagee cannot object to completion of a Bankruptcy sale where the sale is subject to the mortgage. See *Smith* v. *McKenna Brass Mfg. Co.*, 98 Fed. 2d 537 (C. A. 3, 1938), and *In Re Humeston*, 83 Fed. 2d 187 (C. A. 2, 1936). Moreover, Section 308 of the Federal Bankruptcy Act (United States Code Section 708) expressly provides that "A creditor shall be deemed to be '*affected*' by an arrangement only if his interest shall be materially and adversely affected thereby." In the present case, the Petitioner therefore has no standing whatsoever to raise these alleged grounds of error and the Referee and District Court properly so held.

It is also clear that Fox, in his more recently assumed role as a Stockholder, has no standing to object to the Plan of Arrangement and the proposed Sale. Even if Fox's position in this regard were technically correct, which it is not, the facts of the present case are such as to make it crystal-clear that it would be grossly inequitable to allow Fox to maintain such an objection. His motivation is solely self-interest, and not in the interests of the Debtor, its other Creditors, or its other Shareholders. No other Creditor or Shareholder has objected to the proposed Sale to the extent of seeking Review in the District Court or taking an Appeal to the Court of Appeals. Finally, Petitioner Fox's position is not even technically

correct. Petitioner cites one case, as holding that there can be no Chapter XI Plan of Arrangement which affects Stockholders, *In re May Oil Burner Corp.*, 38 Fed. Supp. 516 (D. C. Md., 1941). The Plan of Arrangement in that case proposed a sale of all the debtor's assets to a new corporation, in which the old corporation would hold only 26% of the stock. One of the shareholders of the old corporation, who was a shareholder only and not a creditor, objected on the ground that this was in effect a corporate reorganization, made without his consent. The District Court upheld his objections, observing that the proposed Plan would more properly have been brought under Chapter X, relating to Corporate Reorganizations; and that, if it had been brought under Chapter X, it would have been approved. That case has nothing to do with the present case. If is no part of the Plan in the present case to reorganize the corporation in any way whatsoever. If there are assets remaining in the present case, after payment of Secured Creditors and Unsecured Creditors, according to the Plan, then those remaining assets would be the property of the Shareholders. Petitioner states that the *May Oil Burner* case, and this case, are supposed to be controlled by the Decision of the United States Supreme Court in *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434 (1940). That case likewise has nothing to do with the present case. In that case, there were 900 Creditors and 7,000 Shareholders. There are only about 50 Shareholders in the present case. While Chapter XI might be inappropriate in a case involving widespread public shareholding, and while Chapter X might be more appropriate in such a case, such considerations clearly have nothing to do with the present case.

CONCLUSION.

Respondent submits that the whole point of this case is that a Seller is attempting to forfeit a Buyer's interest in an Installment Agreement to purchase Real Estate. Having failed in his attempt, the Seller persists in his efforts to prevent the Buyer from finding a way out of its difficulties. Having actually induced the filing of Bankruptcy Proceedings against the Buyer, the Seller has striven to put the Buyer under. The Court of Appeals properly held that this was unconscionable conduct and that no such forfeiture should be permitted. The Court of Appeals also properly held that the Seller who did these things, and who would be paid in full in any event, has no standing to object to the Buyer's Plan of Arrangement and its proposed Sale of its interest in the Real Estate to a third party. It is respectfully submitted that, under all these circumstances, the Decisions below are the only ones that could have been reached and that no question merits further review of this case by this Court. The Petition for Certiorari should be denied.

Respectfully submitted,

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March 14, 1963.